APPENDIX A

UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT.

No. 01-14520.

PETER THOSTESON,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

June 2, 2003.

Appeal from the United States District Court for the Middle District of Alabama.

Before EDMONDSON, Chief Judge, and CARNES and SILER* Circuit Judges.

SILER, Circuit Judge:

Subsequent to the publication by the previous panel opinion dated September 11, 2002, published at 304 F.3d 1312 (11th Cir.2002), the United States moved the court to amend the opinion to delete Section III.A., entitled "Allocation of the Burden of Proof." Good cause having been shown, the original panel has granted the motion, withdraws the previous panel opinion of September 11, 2002, and substitutes therefor the following opinion.

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* Honorable Eugene E. Siler, Jr., United States Circuit Judge for the Sixth Circuit, sitting by designation.

Plaintiff Peter Thosteson filed this action against the United States seeking a refund of his partial payment of the tax penalty assessment made against him pursuant to 26 U.S.C. § 6672, based on the failure of the company for which he worked to submit payroll withholding trust fund taxes (the "taxes"). A trial was held, and the jury returned a verdict in his favor for all tax quarters at issue. Pursuant to Rule 50 of the Federal Rules of Civil Procedure, the district court granted judgment as a matter of law for the Defendant United States of America (the "government"), finding Thosteson liable for all tax quarters at issue. Thosteson appeals that decision. We affirm.

I.

In response to an Internal Revenue Service (IRS) assessment, Thosteson filed this action against the government. He seeks a refund of his partial payment of the taxes from the third quarter of 1994 through all four quarters of 1995 (until November 28, 1995), which his employer, Lorac, Inc., failed to remit to the government. The judgment amounts to $1,293,427.09.[1]

Prior to submission of the case to the jury, the government made a motion for judgment as a matter of law. The court reserved decision on that motion. After the jury began deliberations, it returned with a question: "If the jury were to find that plaintiff was a responsible person for only following quarters, third quarter of 1995, fourth quarter of 1995, but was not willful in the failure to pay taxes of said quarters, will Mr. Thosteson be assigned a penalty?" The court answered that an individual must be both "responsible" and "willful" to be liable for the penalty. Subsequently, the jury returned a verdict in favor of the taxpayer. For the last two quarters of

[1] Judgment was actually entered for $1,560,235.45, which includes interest from the date of the assessment. Plaintiff did not contest this figure below, nor does he contest it in this appeal.

1994 and the first two quarters of 1995, the jury found that Thosteson was not a responsible party. For the third and fourth quarters of 1995, the jury found that Thosteson was a responsible party, but his conduct in not paying the taxes was not willful.

The government renewed its request for a judgment as a matter of law. The court granted that motion, overturning the jury verdict and entering judgment for the government.

The district court recounted the following basic facts in its opinion granting the Rule 50 motion:

> Plaintiff was an incorporator of Lorac, Inc., an employee leasing business. Initially he was one of the company's vice-presidents, and his main responsibility was sales and "growing" the business. He had limited authority to hire and fire employees, to determine financial policy, to set salaries and wages, to pay employees, and to enter loan agreements on Lorac's behalf. He opened bank accounts for Lorac with People's Bank in Dothan, Alabama, and was a signatory on those accounts with the ability to write checks under his sole signature for amounts up to $750. Lorac had two different kinds of checks: Checks that expressly required two signatures for amounts above $750, and checks that did not. On at least three occasions, Plaintiff wrote checks for more than $750 under his sole signature on Lorac checks that did not expressly require two signatures [checks in the amount of $1,000, $923.04 and $45,000]. The evidence at trial did not show that those checks were not honored, and conclusively proved that at least one such check was honored [entered into evidence along with the bank statement indicating that the check was cashed and honored]. Further, Plaintiff also had the authority to sign Lorac's Form 941 withholding tax returns, and he did so for the third and fourth quarters of 1995.
>
> In the spring of 1995, Plaintiff purchased a 24% stake in Lorac from its sole shareholder, Garner Umphrey, for

> $288. Umphrey, however, did not cash the check that Plaintiff used to pay him. At some point before the bankruptcy, Plaintiff also became the president of Lorac.
>
> Plaintiff testified at trial that he knew during the entire period at issue in this suit that a responsible person has a duty under the law to assure that withholding taxes are remitted to the United States. And he testified that as of August 28, 1995[,] he was aware that Lorac had failed to remit withholding taxes to the United States, and that, in October 1995, he became aware of the full amount of withholding taxes that Lorac owed.
>
> The undisputed evidence showed that after Plaintiff became aware that Lorac owed withholding taxes to the government and after he became aware of the full amount of the taxes that were owed, he continued to write check after check to other creditors under his signature alone, including checks to Tack and So Forth, Inc. (a joint venture of Lorac and Plaintiff's wife) [for $1,000, dated October 18, 2001], himself [for $280, dated October 20, 1995], Builder's Cash and Carry [for $923, dated October 13, 1995], and Garner Insurance Agency [for $45,000, dated October 13, 2001].

Thosteson v. United States, 182 F.Supp.2d 1189, 1191-92 (M.D.Ala.2001) (notes omitted).

On appeal, Thosteson emphasizes the role of Garner Umphrey, who has also been sued by the government but has disappeared. He describes their relationship as beginning in the late 1980's through Umphrey's uncle, who at tended Thosteson's church. In 1993, Umphrey approached Thosteson about starting an employee leasing business in the civilian context. Umphrey was already involved in employee leasing on behalf of military contractors. Thosteson claims that he originally had no related experience or background, but he educated himself in the computer program area of the business and proceeded to build the company through sales and marketing. He credits his sales and marketing efforts in

late 1994 and early 1995 for making the new business become very successful. During 1995, the company had between four thousand and five thousand employees.

Nevertheless, Thosteson claims that Umphrey was not only the sole stockholder up through April 1995, but he and his wife also controlled all major decisions within the business. He alleges that Umphrey started diverting money from the company into his other business enterprises, and these alleged transfers amounted to hundreds of thousands of dollars.

Regarding the taxes, Thosteson claims that he was not aware of the corporation's failure to pay them until August 28, 1995. He alleges that he was hospitalized when he found out that the taxes had not been paid. Further, after finding out about the tax arrears in August 1995, even though not knowing the amounts of those arrearages, he used his best efforts to try to establish a repayment plan. Thosteson testified that on August 28, 1995, he confronted Umphrey's wife and confirmed with her that the company had substantial overdue payroll tax liabilities. Thereafter, he arranged for Lorac to make weekly payments of $30,000 to the IRS. Thosteson and Umphrey's wife signed three checks for $30,000 on an account of the company, payable to the IRS, and dated August 31, September 6 and September 15, 1995. He alleges that his efforts were frustrated by Umphrey who contradicted his orders and stopped the tax restitution payments. Thosteson does not deny, however, that he knew Umphrey ordered the payments to cease. He claims that he continued to use his best efforts to make the business successful because based on his meeting with Lorac's bookkeeper, he felt that if they continued with the business, then the taxes could be successfully repaid. Thosteson signed the payroll tax return for the third and fourth quarters of 1995.

He testified that in November 1995, he became the president of Lorac through Umphrey's consent and in order to formulate a Chapter 11 bankruptcy plan to repay the taxes

and keep the business going. The company's original petition for reorganization eventually converted to a Chapter 7 liquidation case, and the company went out of business in 1997.

The principal service offered by Lorac to its clients, in addition to volume discounts for workers compensation insurance, was relief from the paperwork of handling payroll, including the filing of federal employment tax returns and the payment of those taxes. The client's employees became employees of Lorac for purposes of payroll processing and payroll taxes.

II.

We review *de novo* a district court's grant of judgment as a matter of law under Rule 50, applying the same standards as the district court. *Slicker v. Jackson,* 215 F.3d 1225, 1229 (11th Cir.2000). We consider whether such sufficient conflicts exist in the evidence to necessitate submitting the matter to the jury or whether the evidence is so weighted in favor of one side that one party must prevail as a matter of law. *Mendoza v. Borden, Inc.,* 195 F.3d 1238, 1244 (11th Cir.1999) (*en banc*). Although we look at the evidence in the light most favorable to the non-moving party, the non-movant must put forth more than a mere scintilla of evidence suggesting that "reasonable and fair-minded persons in the exercise of impartial judgment might reach different conclusions." *Id.* (quoting *Walker v. NationsBank of Florida, N.A.,* 53 F.3d 1548, 1555 (11th Cir.1995)).

III.

Section 6672 imposes liability upon (1) a responsible person (2) who has willfully failed to perform a duty to collect, account for, or pay over federal employment taxes.[2]

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[2] Section 6672 provides:

> Any person required to collect, truthfully account for, and pay over any tax imposed by this title [Title 26 of the United States Code]

See Williams v. United States, 931 F.2d 805, 810, *reh'g granted and opinion supplemented,* 939 F.2d 915 (11th Cir.1991).

A. "Responsible" Person

A person is responsible within the meaning of § 6672 if he has a duty to collect, account for, or pay over taxes withheld from the wages of a company's employees. *Thibodeau v. United States,* 828 F.2d 1499, 1503 (11th Cir.1987). Responsibility is a matter of status, duty and authority, not knowledge. *Mazo v. United States,* 591 F.2d 1151, 1156 (5th Cir.1979).[3] Section 6672 responsibility is a matter of the power and authority to make payment of withholding taxes, which is not dispositively determined by corporate title or position. *Neckles v. United States,* 579 F.2d 938, 940 (5th Cir.1978). "Indicia of responsibility include the holding of corporate office, control over financial affairs, the authority to disburse corporate funds, stock ownership, and the ability to hire and fire employees." *George v. United States,* 819 F.2d 1008, 1011 (11th Cir.1987).

In the case at bar, the government has met its burden by presenting overwhelming evidence as to all of the mentioned indicia of responsibility. Thosteson vehemently argues that Umphrey was the responsible person. However, a company may have more than one responsible person within the

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> who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.

26 U.S.C. § 6672(a).

[3] In *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir.1981) (*en banc*), we adopted as binding precedent the decisions of the former Fifth Circuit handed down prior to October 1, 1981.

meaning of § 6672. *Thibodeau*, 828 F.2d at 1503. Because Umphrey was responsible does not absolve Thosteson of responsibility. Thosteson helped incorporate Lorac, served as vice-president and president, owned varying levels of stock in Lorac from 24% to 100%, and possessed the authority to hire and fire. It is logical that a vice-president who was also a significant shareholder would be a responsible person under the statute.

Furthermore, the government's point that Thosteson admits to being in charge of marketing is well taken. The principal benefit to this employee leasing arrangement, which Lorac's marketing materials stressed, is the tax and administrative savings, and much of the administrative savings has to do with tax-related payroll deductions and withholdings.

Thosteson's principal argument as to the limits of his authority and "responsibility" under § 6672 relates to his claim that he had limited check writing authority, up to only $750, without a countersignature of Umphrey or his wife. In dispensing with this same argument, the Fifth Circuit observed: "[Plaintiff] also argues that he did not have the actual authority to pay the entire tax bill because his check writing authority was limited to relatively small amounts .... [but][t]he Internal Revenue Service would certainly not have objected to payment of the tax deficiency by several small checks." *Gustin v. I.R.S.*, 876 F.2d 485, 492 (5th Cir.1989). We agree. Thus, even presuming the limitations on his authority imposed by Umphrey and ignoring the overwhelming evidence presented by the government to the contrary, this would not remove his "responsibility" under § 6672. Therefore, the finding that Thosteson was a "responsible" person as a matter of law was not erroneous. The government has more than met its burden here.

B. Willful Failure

Turning to the requirement of willfulness, this court has held that the willfulness requirement of § 6672 is satisfied if the responsible person has knowledge of payments to other creditors after he becomes aware of the failure to remit the withheld taxes. *Williams*, 931 F.2d at 810 (citing *Smith v. United States*, 894 F.2d 1549, 1553 (11th Cir.1990) and *Thibodeau*, 828 F.2d at 1505). Willfulness, however, "does not require a fraudulent or other bad motive on the part of the responsible person." *Id.* (citing *Hewitt v. United States*, 377 F.2d 921, 924 (5th Cir.1967)).

Thosteson admits that he became aware of the trust fund arrearages on August 28, 1995. He claims, however, that Umphrey ordered the suspension of the $30,000 weekly repayment schedule. Nevertheless, the "Nuremburg defense," as some courts have referred to it, is not available to Thosteson. *See Brounstein v. United States*, 979 F.2d 952, 956 n. 5 (3d Cir.1992) (discussing and dismissing "Nuremburg defense," holding it is no defense that taxpayer "served only as a nominal president whose signature constituted a mere 'rubber stamp' for [principal shareholder-director's] decisions" and "instructions from a superior not to pay taxes do not . . . take a person otherwise responsible . . . out of that category"); *Roth v. United States*, 779 F.2d 1567 (11th Cir.1986) (holding vice president and minority shareholder who handled day-to-day operations and wrote corporate checks was a responsible person even though the president had instructed him not to pay the government).[4] Thosteson

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[4] *See also Gephart v. United States*, 818 F.2d 469 (6th Cir.1987) (holding nonshareholder general manager was a responsible person, notwithstanding testimony that major shareholder had told him it was none of his business that withheld taxes were not being paid); *Howard v. United States*, 711 F.2d 729 (5th Cir.1983) (holding director and treasurer of corporation, who had signatory authority over main corporate checking account, was a responsible person even though chief executive officer

knew that the taxes were owed and that they were not being paid under Umphrey's order. Acting, or rather failing to act, under orders from his superior does not negate his culpability under the statute.

Thosteson admits that he became the undisputed president of the company, with concomitant authority, at the beginning of November, prior to the filing of bankruptcy. He was aware of the arrearages, and after he became aware of this deficiency, he still issued 262 checks to various creditors and others, including himself and his wife's company. Even if a "responsible" person is unaware that withholding taxes have gone unpaid in past quarters, a responsible person who becomes aware that taxes have gone unpaid in past quarters in which he was also a responsible person, is under a duty to use all "unencumbered funds" available to the corporation to pay those back taxes. *Mazo,* 591 F.2d at 1157; *see also United States v. Kim,* 111 F.3d 1351, 1357 (7th Cir.1997) (same); *Honey v. United States,* 963 F.2d 1083, 1089 (8th Cir.1992) (same). This duty extends not only to funds available to the corporation at the time the responsible person becomes aware but also to any unencumbered funds acquired thereafter. If the responsible person fails to use such unencumbered funds to satisfy the past unpaid liability, he is deemed personally liable for the taxes that went unpaid in the past while he was responsible. The responsible person deemed liable for the unpaid liability of past tax quarters is considered to have

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upon hearing of payment to IRS had ordered plaintiff not to pay IRS any more money and subsequently suspended him for several weeks; after resigning in part based on company's failure to remit the taxes, plaintiff notified IRS of corporation's unpaid taxes, but though corporation then had substantial assets, when IRS sought to collect taxes more than two years later, it had none); *Greenberg v. United States,* 46 F.3d 239 (3d Cir.1994) (holding controller was a responsible person even though the chief executive officer ordered him not to pay trust fund taxes, and he believed that if he issued a check for the taxes, it would bounce and he would be fired).

"willfully" failed to pay over the taxes for those past quarters, even though he was unaware at that time that the taxes were going unpaid. *Mazo*, 591 F.2d at 1157. Even giving Thosteson the benefit of the doubt, that he was merely paying other creditors in order to keep the company going and preserve its ability to repay the tax debt, he is still liable under the law of this Circuit.

C. Reasonable Cause

Finally, Thosteson raises the putative defense of "reasonable cause." *See, e.g., Finley v. United States*, 123 F.3d 1342 (10th Cir.1997) (reasonable cause sufficient to excuse a responsible person's failure to pay withholding taxes occurs in circumstances where (1) the taxpayer has made reasonable efforts to protect the trust funds, but (2) those efforts have been frustrated by circumstances outside the taxpayer's control). This Circuit has not yet addressed whether a defense of "reasonable cause" can avoid a finding of willfulness in this context. We decline, however, to address this issue today. Such defense as applied by other circuits would still not be applicable under the facts of this case for the same reasons set forth by the Fifth Circuit in addressing a similar situation:

We have consistently held that the reasonable cause defense to a § 6672 action is exceedingly limited. In *Bowen v. U.S.*, 836 F.2d 965, 968 (5th Cir.1988), we stated that "[a]lthough we have recognized conceptually that a reasonable cause may militate against a finding of willfulness, no taxpayer has yet carried that pail up the hill." *See also Newsome v. U.S.*, 431 F.2d 742, 747 (5th Cir.1970). No such defense may be asserted by a responsible person who knew that the withholding taxes were due, but who made a conscious decision to use corporate funds to pay creditors other than the government. *Newsome*, 431 F.2d at 747 n. 11; *Frazier v. U.S.*, 304 F.2d 528, 530 (5th Cir.1962).

Here, [plaintiff] consciously decided to make payments to creditors other than the government even though he knew that the withholding taxes had not been paid. The facts [plaintiff] relied on were not sufficient to support a reasonable cause defense.

Logal v. United States, 195 F.3d 229, 233 (5th Cir.1999); *cf. Finley,* 123 F.3d at 1342 (finding potential "reasonable cause" where as soon as individual determined that taxes were owed, ordered subordinate to pay the taxes without reason to doubt that subordinate would do so, and subordinate did not pay the taxes; when the failure was discovered, no unencumbered funds were available to pay the liability).

IV.

We do not quarrel with Thosteson's contention that Umphrey is the more culpable party, but even so conceding, being less culpable does not exonerate Thosteson from his responsibility, which he knowingly disregarded. As we have observed, "[t]he seeds of common sense compassion sown by the jury find scant hospitality on this rock hard legal landscape." *Williams,* 931 F.2d at 811. The district court did not err in setting aside of the jury's verdict and granting judgment as a matter of law to the government.[5]

AFFIRMED.

331 F.3d 1294, 91 A.F.T.R.2d 2003-2468, 16 Fla. L. Weekly Fed. C 684.

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[5] Thosteson's assignment of error relating to the court's response to the jury's question is mooted by our finding that judgment as a matter of law was not in error. Likewise, there is no merit to his claim that the grant of the judgment as a matter of law denied him his right to a jury trial.

APPENDIX B

UNITED STATES DISTRICT COURT
M.D. ALABAMA
SOUTHERN DIVISION

No. CIV.A.00-T-622-S
Aug. 7, 2001.

PETER THOSTESON,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

MEMORANDUM OPINION

MYRON H. THOMPSON, *District Judge.*

Plaintiff Peter Thosteson filed this action against defendant United States, seeking a refund of his partial payment of a penalty assessment made against him pursuant to 26 U.S.C.A § 6672 for withholding taxes from the third quarter of 1994 through November 28, 1995, that his employer, Lorac, Inc., did not remit to the government. A trial was held on August 1 and 2, 2001, and after the close of evidence and argument, the jury returned a verdict in favor of Thosteson for all the quarters at issue.

This cause is now before the court on the oral motion by the government for judgment as a matter of law pursuant to *Rule 50 of the Federal Rules of Civil Procedure*. For the reasons below, this motion will be granted.

I. LEGAL STANDARD

Rule 50 permits a court to enter judgment as a matter of law if, after an adequate hearing, there is no legally sufficient

evidentiary basis for a jury's verdict. *See* Fed.R.Civ.P. 50. When ruling on a motion for judgment as a matter of law, the court must consider all of the evidence in the light most favorable to the party opposed to the motion. *See, e.g., Williams v. United States*, 931 F.2d 805, 809 (11th Cir.1991); *Smith v. United States*, 894 F.2d 1549, 1552 (11th Cir.1990); *Thibodeau v. United States*, 828 F.2d 1499, 1503 (11th Cir.1987). A motion for judgment as a matter of law should be granted only if, viewing the evidence as a whole and drawing all reasonable inferences in favor of the nonmoving party, no reasonable jury could reach a contrary verdict. *See Williams*, 931 F.2d at 809.

II. FACTS

Thosteson was an incorporator of Lorac, Inc., an employee leasing business. Initially he was one of the company's vice-presidents, and his main responsibility was sales and "growing" the business. He had limited authority to hire and fire employees, to determine financial policy, to set salaries and wages, to pay employees, and to enter loan agreements on Lorac's behalf. He opened bank accounts for Lorac with People's Bank in Dothan, Alabama, and was a signatory on those accounts with the ability to write checks under his sole signature for amounts up to $750. Lorac had two different kinds of checks: Checks that expressly required two signatures for amounts above $750, and checks that did not. On at least three occasions, Thosteson wrote checks for more than $ 750 under his sole signature on Lorac checks that did not expressly require two signatures.[1] The evidence at trial did not show that those checks were not honored, and conclusively proved that at least one such check was

[1] *See* Government's Exhibits 408 (check for $ 1,000), 382 (check for $ 923.04), and 383 (check for $ 45,000).

honored.[2] Further, Thosteson also had the authority to sign Lorac's Form 941 withholding tax returns, and he did so for the third and fourth quarters of 1995.

In the spring of 1995, Thosteson purchased a 24 % stake in Lorac from its sole shareholder, Garner Umphrey, for $288. Umphrey, however, did not cash the check that Thosteson used to pay him. At some point before the bankruptcy, Thosteson also became the president of Lorac.

Thosteson testified at trial that he knew during the entire period at issue in this suit that a responsible person has a duty under the law to assure that withholding taxes are remitted to the United States. And he testified that as of August 28, 1995 he was aware that Lorac had failed to remit withholding taxes to the United States, and that, in October 1995, he became aware of the full amount of withholding taxes that Lorac owed.

The undisputed evidence showed that after Thosteson became aware that Lorac owed withholding taxes to the government and after he became aware of the full amount of the taxes that were owed, he continued to write check after check to other creditors under his signature alone, including checks to Tack and So Forth, Inc. (a joint venture of Lorac and Thosteson's wife),[3] himself,[4] Builder's Cash and Carry,[5] and Garner Insurance Agency.[6]

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[2] *See* Government's exhibit 408, along with the bank statement entered in evidence indicating that the check was cashed and honored.

[3] *See* Government's exhibit 408 (check for $1,000, dated October 18, 2001).

[4] *See* Government's exhibit 397 (check for $280, dated October 20, 1995).

[5] *See* Government's exhibit 382 (check for $923, dated October 13, 1995).

[6] *See* Government's exhibit 383 (check for $45,000, dated October 13, 2001).

II. DISCUSSION

Section 6672 imposes liability upon (1) a responsible person (2) who has willfully failed to perform a duty to collect, account for, or pay over federal employment taxes.[7] *See, e.g., Williams*, 931 F.2d at 810; *Thibodeau*, 828 F.2d at 1503; *George v. United States*, 819 F.2d 1008, 1011 (11th Cir.1987). The Eleventh Circuit agrees with the vast majority of other courts in holding that in tax refund cases, such as the case at bar, the burden of proof is on the plaintiff to show that the Internal Revenue Service's findings in assessing a deficiency are incorrect. *See, e.g., Trucks, Inc. v. United States*, 234 F.3d 1340, 1342 (11th Cir.2000). Specifically in the context of § 6672 cases, the Eleventh Circuit has held that it is the taxpayer's burden to establish that he or she was not willful in failing to pay over withholding taxes. *See, e.g., Malloy v. United States*, 17 F.3d 329, 331 (11th Cir.1994). However, the Court of Appeals has not directly decided who bears the burden of proof on the issue of whether a taxpayer is a responsible person in a refund suit for a § 6672 penalty. This court need not reach that issue here because both parties have agreed that the taxpayer in this suit bears the burden of showing that he was not a responsible person,[8] and, in any event, the allocation of the burden of proof does not bear on the court's findings, as discussed below, with regard to Thosteson's responsibility and willfulness.

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[7] *Section 6672* provides, in pertinent part, as follows:

> "Any person required to collect, truthfully account for, and pay over any tax imposed by this title [Title 26 of the United States Code] who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over."

[8] *See* Plaintiff's proposed jury instructions at 3.

A person is responsible within the meaning of § 6672 if he or she has a duty to collect, account for, or pay over taxes withheld from the wages of a company's employees. *See, e.g., Williams*, 931 F.2d at 810; *Thibodeau*, 828 F.2d at 1503; *George*, 819 F.2d at 1011. Responsibility is a matter of status, duty, and authority, not knowledge. *See Thibodeau*, 828 F.2d at 1503; *Mazo v. United States*, 591 F.2d 1151, 1156 (5th Cir.)[9], *cert. denied*, 444 U.S. 842, 100 S.Ct. 82, 62 L.Ed.2d 54 (1979). However, the law is clear that § 6672 responsibility is a matter of the power and authority to make payment of withholding taxes, and is not dispositively determined by corporate title or position. *See Neckles v. United States*, 579 F.2d 938, 940 (5th Cir.1978). "Indicia of responsibility include the holding of corporate office, control over financial affairs, the authority to disburse corporate funds, stock ownership, and the ability to hire and fire employees." *George*, 819 F.2d at 1011.

The undisputed evidence in this case establishes beyond any doubt that Thosteson was a responsible person under § 6672: He had sufficient control over the financial affairs and day-to-day operations of Lorac, he had power to disburse corporate funds under his own name and authority, he held the position of a vice-president, he was a signatory on Lorac's bank accounts, and he set employee salaries, including his own. That other individuals may also have had these powers at Lorac is immaterial. The law is unambiguous that there may be more than one responsible person in a corporation, *see Williams*, 931 F.2d at 810 n. 7, and the fact that other persons involved with Lorac may have been responsible as well does not detract from the conclusion that Thosteson is a responsible person. This is most dramatically demonstrated

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[9] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), the Eleventh Circuit Court of Appeals adopted as binding precedent the decisions of the former Fifth Circuit handed down prior to October 1, 1981.

by these facts: He was a signatory on some bank accounts with the ability to write checks under his sole signature for amounts up to $750 on some occasions and the ability to write checks for more than $750 under his sole signature on others. Moreover, after Thosteson became aware that Lorac owed withholding taxes to the government and after he became aware of the full amount of the taxes that were owed, he continued to write check after check to other creditors under his signature alone.

The only changes in Thosteson's authority or position within Lorac during the period at issue in this suit were that he purchased, or attempted to purchase, a 24 % stake in Lorac from Garner Umphrey, and that at some time Thosteson became Lorac's president. However, neither of these changes altered the authority that Thosteson had—and exercised—to make payments to Lorac's creditors. And, as stated, corporate titles are not determinative of responsibility under § 6672. *See Neckles*, 579 F.2d at 940. And even if these changes altered Thosteson's authority, the evidence is undisputed that as of the end of the third quarter of 1995, Thosteson's authority was no less than he enjoyed since Lorac was incorporated, and, additionally, he was the company's president. Viewing all the evidence as a whole, and drawing all factual inferences in Thosteson's favor, no reasonable jury could have found that he was not a responsible person under § 6672.

The court now turns to the issue of Thosteson's willfulness. The term "willfulness" as used in criminal tax statutes is defined as the "voluntary, intentional violation of a known legal duty." *Cheek v. United States*, 498 U.S. 192, 200, 111 S.Ct. 604, 610, 112 L.Ed.2d 617 (1991). At a minimum, to satisfy the willfulness requirement of § 6672, a person must have some knowledge of failure or risk of failure to remit the employment taxes. *See Cooper v. United States*, 60 F.3d 1529, 1532 (11th Cir.1995); *Thibodeau v. United States*, 828

F.2d 1499, 1505-06 (11th Cir.1987). The Eleventh Circuit has held that the willfulness requirement of § 6672 is satisfied if the responsible person has knowledge of payments to other creditors after he becomes aware of the failure to remit the withheld taxes. *See Williams*, 931 F.2d at 810; *Smith*, 894 F.2d at 1553; *Thibodeau*, 828 F.2d at 1505. Willfulness, however, "does not require a fraudulent or other bad motive on the part of the responsible person." *Hewitt v. United States*, 377 F.2d 921, 924 (5th Cir.1967).

In this case, Thosteson testified that, as of August 28, 1995, he knew that Lorac was in arrears to the government on its withholding tax payments. He testified that, in October 1995, he knew the entire amount of the withholding taxes that Lorac owed, but had not paid, for all periods at issue in this suit. He also testified that he was aware of the duty of responsible persons to assure that withholding taxes be paid.

Despite this, during those times, he not only knew of payments to other creditors of Lorac, but he wrote and signed checks to make such payments: He wrote checks, under his sole name and authority, to—among others—his wife's company, Tack and So Forth, Inc., himself, Garner Insurance, and Builders Cash and Carry.[10] At least one check for more than $750 written under his name alone was honored by Lorac's bank. He also wrote check after check for amounts less than $750 to other creditors. Thosteson could have been writing those checks to the Internal Revenue Service instead.[11]

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[10] *See* Government's exhibits 382, 383, 397, and 408.

[11] Thosteson has disputed that he could have paid an amount over $ 750 to the government on his own authority. This is, however, not material. There is no requirement that payment to the government for withholding taxes be in one lump sum. Although it would have required writing many checks to cover Lorac's obligation, Thosteson himself, under his own undisputed authority could have done so. That he preferred not to, or that he may not have considered this solution, is not a defense.

Thosteson's preference for other creditors over the United States, given his knowledge both of Lorac's tax situation and his understanding of the duty of responsible persons to pay withholding taxes, establishes as a matter of law that Thosteson's failure to pay was willful. *See Williams*, 931 F.2d at 810; *Smith*, 894 F.2d at 1553; *Thibodeau*, 828 F.2d at 1505. No reasonable jury could have found otherwise.

IV. CONCLUSION

Considering the record as a whole and construing all inferences most favorably to Thosteson, any reasonable jury would have to find that he was a responsible person and that his failure to pay the amounts owed the government was willful. Accordingly, the motion by the United States for judgment as a matter of law will be granted.

182 F.Supp.2d 1189, 88 A.F.T.R.2d 2001-5564, 2001-2 USTC P 50,653, Unempl.Ins.Rep. (CCH) P 16615B

APPENDIX C

UNITED STATES DISTRICT COURT,
M.D. ALABAMA.

No. 00-T-622-S.

PETER THOSTESON,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

Aug. 31, 2001.

ORDER

THOMPSON, J.

This cause is now before the court on the motion to modify judgment filed by defendant United States of America on August 13, 2001. The government requests, pursuant to Rules 59 and 60 of the Federal Rules of Civil Procedure, that the court modify the judgment entered August 7, 2001.

As grounds, the government argues that its posttrial oral motion was intended to request judgment in its favor both as to plaintiff Peter Thosteson's claims and as to the government's counterclaims, that the memorandum opinion entered on August 7, 2001, is consistent with this understanding of the motion, and that, as a matter of law, the government is entitled to judgment for the full outstanding amount of the 100% penalty assessed against Thosteson pursuant to 26 U.S.C.A. § 6672, that is, $1,560,235.45, a figure which Thosteson has not contested.

After consideration, the court agrees. The judgment that the court entered in this matter was intended to grant judgment in favor of the government both as to the claims of Thosteson and the counterclaim of the government. A review of the judgment itself reveals that this intent is not clearly conveyed by the language the court adopted.

B.

Furthermore, because the government filed a motion to modify judgment on August 13, 2001, which was after Thosteson filed his notice of appeal in this cause on August 9, 2001, the question is posed as to whether the court has jurisdiction to consider the modification motion. The answer is 'yes' for two reasons: First, the Eleventh Circuit Court of Appeals "has decided that a district court retains jurisdiction to consider and deny a Rule 60(b) motion filed after the perfection of an appeal of the original decision." *Wilson v. Thompson,* 638 F.2d 801, 803 (11th Cir.1981); *see also* Fed.R.App.P. 4(a)(4) (advisory committee notes to 1993 amendments) ("The amendment provides that a notice of appeal filed before the disposition of a specified posttrial motion will become effective upon disposition of the motion. A notice filed *before the filing of one of the specified motions* or after the filing of a motion but before disposition of the motion is, in effect, suspended until the motion is disposed of, whereupon, the previously filed notice effectively places jurisdiction in the court of appeals.") (emphasis added).

Second, Thosteson's appeal is arguably ineffectual because it was filed before the court entered a final order disposing of all claims, that is, the remaining claims against Quentin Garner Umphrey and Candice Chapman Umphrey, on August 17, 2001. Rule 54(b) of the Federal Rules of Civil Procedure provides:

> "Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented

> in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

At the time Thosteson filed his appeal, the court had "adjudicate[d] fewer than all the claims or the rights and liabilities of fewer than all the parties" "For an appeal to be perfected following a decision that falls within the ambit of Rule 54(b), the district court must make an express 'direction for the entry of judgment' and a 'determination that there is no just reason for delay,' '10 James Wm. Moore, *et al.*, Federal Practice and Procedure § 2660 at 137 (3d ed.1998), which, of course, was not done here.

Accordingly, it is ORDERED that the motion to modify judgment filed by defendant United States of America on August 13, 2001, is granted, that the judgment entered on August 7, 2001, is vacated, and that an amended judgment consistent with the memorandum opinion entered August 7, 2001, for the full outstanding amount of the penalty assessed against plaintiff Peter Thosteson, including credits and payments, will be entered.

2001 WL 1172416 (M.D.Ala.), 88 A.F.T.R.2d 2001-5859

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

01-14520-II

THOSTESON

v.

U.S.

July 9, 2003, Decided

OPINION:

Suggestion for Rehearing En Banc Denied.